Nos. 76-793, 76-1081

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN D. EHRLICHMAN, PETITIONER,

v.

UNITED STATES OF AMERICA

JOHN N. MITCHELL AND HARRY R. HALDEMAN, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

As to all petitioners:

1. Whether a continuance on gounds of pre-trial publicity was properly denied where a fair and impartial jury was chosen after a thorough *voir dire* and where neither the nature of the publicity nor the results of the *voir dire* afforded any basis for challenging the jurors' sworn assurance that they had no opinion of defendants' guilt and could render verdicts based solely upon the evidence and the law.

2. Whether the court of appeals was correct in refusing to exercise its supervisory power to adopt an invariable rule that a lengthy continuance is required in all cases of extensive pre-trial publicity regardless of whether an impartial jury can be chosen through procedures uniformly followed by the federal courts and regardless of whether a fair trial can be afforded in accordance with constitutional requirements and decisions of this Court.

3. Whether the district court properly refused to suspend the trial until former President Nixon could be deposed or appear as a witness, where there was no showing that he would testify favorably to the petitioners and where his testimony only could have been cumulative.

As to petitioner Ehrlichman:

4. Whether petitioner Ehrlichman was afforded his right to counsel and all discovery rights where counsel was permitted to assist petitioner in his review of his White House files.

As to petitioner Mitchell:

5. Whether it was proper for the government to use petitioner Mitchell's prior testimony before congressional committees, where, accompanied by counsel and fully aware of his rights, petitioner had waived his Fifth Amendment privilege against self-incrimination in giving that testimony.

6. Whether the district judge properly refused to recuse himself pursuant to 28 U.S.C. § 144 where none of the factual allegations presented in support of the claim of bias raised an inference of personal prejudice against petitioner Mitchell.

STATEMENT

Petitioners—John D. Ehrlichman, Harry R. Haldeman and John N. Mitchell—were convicted after a jury trial in the United States District Court for the District of Columbia (Sirica, J.) of conspiracy (18 U.S.C. § 371), obstruction of justice (18 U.S.C. § 1503) and giving false testimony under oath (18 U.S.C. §§ 1621, 1623).[1] The charges arose out of the so-called "Watergate cover-up," a conspiracy to defraud the United States and obstruct justice that was designed to conceal the identity of President Nixon's White House aides and campaign officials who were responsible for or had knowledge of the Watergate break-in and other illegal activities.[2] Each petitioner was sentenced to imprisonment for two and one-half years to eight years. The court of appeals, sitting *en banc*, affirmed, with one judge dissenting.

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[1]Petitioner Ehrlichman was convicted of two counts of committing perjury before the grand jury, petitioner Haldeman of three counts of making false declarations to the Senate Select Committee on Presidential Campaign Activities, and petitioner Mitchell of two counts of perjury before the grand jury and one count of false declarations to the Senate Select Committee. Counts 3 and 10, charging petitioners Mitchell and Ehrlichman, respectively, with false statements to the FBI, were dismissed at the close of the Government's case.

[2]Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson and Gordon Strachan also were named as defendants. The charges against Colson were dismissed following his guilty plea in another case. *United States* v. *Colson*, D.C.C. Crim. No. 74-116. Mardian's conviction was reversed by the court of appeals. *United States* v. *Mardian*, *546* F.2d *973* (C.A. D.C.), and the Government elected not to retry him. Parkinson was acquitted by the jury, and the charges against Strachan, who was severed as a result of legal problems relating to use immunity, were dismissed pursuant to Rule 48(a), Fed. R. Crim. P.

1. *The Watergate Break-In*

In the early morning hours of June 17, 1972, five men, including James McCord, a security officer of the Committee to Re-Elect the President ("CRP"), were arrested in the offices of the Democratic National Committee headquarters in the Watergate office building in Washington, D.C., as they were attempting to photograph documents and to repair an electronic "bug" that had been installed during an earlier entry. The entries were made pursuant to an elaborate CRP intelligence gathering plan called "Gemstone" that had been approved by former Attorney General Mitchell, who was then President Nixon's campaign director. The entry team was under the immediate supervision and direction of G. Gordon Liddy, CRP's general counsel, and E. Howard Hunt, a former CIA agent. Several months earlier, Hunt and Liddy with the approval of Ehrlichman, President Nixon's chief domestic advisor, had planned and executed a covert operation on behalf of the White House "Plumbers" to secure the psychiatric records of Daniel Ellsberg from his doctor's officers. (Tr. 3276-77, 4132-49, 4514-17, 4638-39, 7666-74.)[3]

2. *The Birth of the Conspiracy*

After an abortive attempt by Mitchell to secure McCord's release before his identity was discovered (McCord had given an alias to the police), CRP issued a press release in Mitchell's name on June 18 denying that McCord had been operating on CRP's behalf or with its consent and intimating that McCord must have been working for "business clients" of his private security

[3]"Tr." refers to the Trial Transcript, which was lodged with the court of appeals.

agency. Haldeman, despite knowledge of "Liddy's operation," specifically approved the release. (Tr. 4534-44, 5898-5909, 6563-69; J.A. 912.)[4] The next day, acting on Mitchell's suggestion that he "have a fire," Jeb Magruder, Mitchell's deputy at CRP, burned CRP's Gemstone file. (Tr. 4140-50). Haldeman, in turn, instructed his assistant, Gordon Strachan, to make sure nothing was embrassing in their files. Strachan destroyed DNC wiretap reports and a memorandum from Haldeman to Magruder with instructions to transfer the CRP intelligence operation from Senator Muskie to Senator McGovern. (Tr. 2651-53.)

Finally, Ehrlichman, who had been briefed by John Dean, Counsel to the President, on the involvement of Mitchell, Liddy and Hunt in the break-in, instructed Dean to take possession of Hunt's White House safe. At first he told Dean to shred the sensitive Plumbers documents in the safe, including a psychiatric profile of Ellsberg, and to "deep six" the attache case full of electronic equipment, but at Dean's insistence (several people knew that Dean had removed materials from the safe), Ehrlichman later agreed to give everything except the documents to the FBI agents investigating the case. (By that time Hunt had been tied to the burglars.) Ehrlichman gave the documents to L. Patrick Gray, the Acting Director of the FBI, in a sealed envelope, telling Gray that the materials in the envelope were unrelated to Watergate, but were "political dynamite" and should not see "the light of day." (Tr. 2679-87.)

Also on Ehrlichman's instructions, Dean determined from Gray that the FBI planned to interview two men (one a Mexican lawyer) who the FBI believed had provided the funds found in the burglars' possession when

[4]"J.A." refers to the Joint Appendix in the court of appeals.

they were arrested. Petitioners were well aware that an unfettered investigation would tie the funds to CRP. Informed about the impending interviews and the FBI's belief that the CIA might be involved, Haldeman met with the President on June 23 and told him that they were "back . . . in the problem area because the FBI is not under control . . . their investigation is now leading into some productive areas, because they've been able to trace the money." Haldeman suggested that, according to Dean and Mitchell, the "way to handle this" was to "have Walters [the Deputy Director of the CIA] call Pat Gray and just say, 'Stay the hell out of this . . . we don't want you to go any further on it.'" The President agreed. (Tr. 2690-2710; Tape Tr. 2-7.)[5]

Within hours, Haldeman and Ehrlichman met with Walters and CIA Director Richard Helms. Haldeman voiced his concern that the break-in "was making a lot of noise, the Democrats were trying to maximize it, and the investigation was leading to some important people." Despite Helms' statement that there was no CIA involvement, Haldeman instructed Walters to tell Gray that the Mexican interview might uncover CIA operations and that, since five suspects already had been arrested, it would be better not to push the matter further. Although ultimately unsuccessful, this effort to prevent the FBI from investigating the Mexican money chain caused a two-week delay in revealing CRP's financial ties to the burglars, giving the conspirators additional time to develop their false cover story. (Tr. 6123-30, 6202-10.)

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[5]"Tape Tr." refers to the three-volume Appendix of Transcripts in the court of appeals of the tape recordings played to the jury. Transcripts of the recordings were provided to the jury as "listening aids" and were not introduced into evidence.

3. *The Cover Story*

While Dean monitored the FBI's investigation and kept petitioners fully informed of its status (Tr. 2690-97, 2830-34, 6217-21), CRP officials with the aid of Dean developed a story to "explain" the $199,000 in CRP funds that had been disbursed to Liddy pursuant to Mitchell's Gemstone authorization. They seized upon the theory that Liddy had been on a "lark of his own." (They earlier had been assured that Liddy would remain silent.) With the aid of Mitchell and Dean, Magruder prepared his grand jury testimony: he would say that $100,000 had been given to Liddy to finance a program to protect "surrogate speakers" (officials who campaigned on the President's behalf), while the remainder was budgeted for convention security. When Magruder was resummoned to the grand jury to be questioned about entries in his diaries that reflected meetings with Mitchell, Dean and Liddy at which Gemstone had been discussed, he again met with Mitchell and Dean to devise a false, but plausible account. Magruder told the grand jury that the first meeting had been canceled and that the second concerned the new election law. (Tr. 2759-76, 2825-29, 4552-62, 4606-16.)

Mitchell and Ehrlichman played supporting roles. Each denied to the FBI any knowledge of the break-in other than what he had read in the newspapers, and Mitchell testified before the grand jury that he was not aware of any covert CRP intelligence program directed at the Democrats or of Liddy's political espionage activities.[6] Tr. 2820-24. 5393-5402.

4. *The Payment of Hush Money*

From the outset, petitioners also realized that success of the conspiracy depended upon paying "hush money"

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[6]This grand jury testimony formed the basis of the perjury charge in Count Four, on which Mitchell was convicted. (J.A. 80.)

to silent those under investigation. Liddy had told CRP officials that those arrested would remain silent, but that commitments had been made to supply them with bail money, living expenses and legal fees. At first Mitchell and Ehrlichman agreed that Dean should try to enlist the CIA as a source of covert funds. When that failed, Haldeman and Ehrlichman approved Dean's asking Herbert Kalmbach, President Nixon's personal attorney and principal fund raiser, to raise money to keep the burglars "on the reservation." Between July 1 and September 15 Kalmbach, using clandestine means, distributed $134,000 in cash. At one point he sought assurance from Ehrlichman that his activities were authorized. Ehrlichman told him to go ahead, but stressed the need for secrecy; otherwise, he said, "they would have our heads in their laps." (Tr. 2728-42, 6315-49, 6477-6511, 6601-03; Tape. Tr. 456.)

On September 15, the grand jury returned an indictment charging only Hunt, Liddy and the five arrested burglars (Tr. 4221-22). Payments continued through the Presidential election, with another $73,000 being delivered. On November 14, however, Hunt complained to Charles Colson, Special Counsel to the President, that the commitments "have not been met" and warned that there was "a great deal of unease and concern on the part of the seven defendants.[11] He set a deadline of November 25 for "the liquidation of everything that's outstanding" and ended his message vividly:

> "after all we're protecting the guys who, who were really responsible. But not that's uh,—and then of course that's a continuing, uh, requirement, but at same time, this is a two-way street."

(Tr. 4250-54; Tape Tr. 646-47, 651).

Colson, who had recorded the conversation, immediately gave the tape to Dean, who then played it for

Haldeman and Ehrlichman. Ehrlichman's responded that Mitchell should take care of the matters and Dean then played the recording for Mitchell, telling him that Haldeman and Ehrlichman expected him to handle the situation. Subsequently, Haldeman approved the use of a $350,000 political fund he controlled to meet the burglars' demands. (Tr. 2909-41, 3039-41, 4260-61, 6705-08; Tape Tr. 244-46).

5. *Assurances of Clemency*

At the same time, Ehrlichman approved giving veiled assurances of executive clemency to Hunt. Hunt had decided to plead guilty and was concerned about a lengthy sentence. At the urging of Mitchell, similar assurances were given to McCord, who had threatened in a letter to a friend in the White House that "all the trees in the forest will tumble." (Tr. 2987-3001, 4261-70.) Although McCord and Liddy insisted on going to trial (but did not testify), Hunt and the remaining defendants pleaded guilty. The sentencing of all the defendants (including Liddy and McCord, who were found guilty) was set for March 23, 1973. (Tr. 4271.)

6. "*Buying Time*"

On March 16, Hunt passed a message to Dean demanding $72,000 for support and $50,000 for attorneys' fees to put his financial affairs in order before sentencing. He threatened to review his options and perhaps reveal the "seamy things" he had done for Ehrlichman and the White House if his demands were not met. In a meeting with the President and Haldeman on March 21, Dean reviewed the developments, characterizing them as a "cancer—within, close to the Presidency, that's growing." They discussed the need for "another plan," but decided they had "no choice on Hunt," that they had to meet his demands to "buy time." (Tr. 3086-3100; Tape Tr. 103, 131-37, 155-66, 189-206.)

The decision to pay Hunt, so that he would not "tell all" at sentencing, was reaffirmed in a meeting that afternoon among the President, Haldeman, Ehrlichman and Dean. They assumed (correctly) that Mitchell would take care of the problem. (Tape Tr. 212-13.) The next day Mitchell reported to Haldeman, Ehrlichman and Dean that the Hunt "problem" had been taken care of. As Ehrlichman explained to an aide who had been involved in the Ellsberg break-in and was concerned that Hunt would "blow," Hunt was "stable" and now was the time to "hang tough." (Tr. 3208-13, 7663-65, 7680, 8589-90, 10, 280.)

Petitioners turned their attention to developing a new strategy, which was particularly important in light of the upcoming hearings of the Senate Select Committee on Presidential Campaighn Activities. In a meeting on March 22, the President, Haldeman, Ehrlichman, Mitchell and Dean fixed on the possibility of a "Dean report," either to be published or given to the Senate Select Committee, that would say "nobody was involved." According to Ehrlichman, if "some of this thing comes unstuck," the President would be in a position to rely on the report. Haldeman called it a "limited hang out"; Ehrlichman, a "modified limited hang out." (Tr. 3213-21; Tape Tr. 273-77, 286-87).

7. *The Conspiracy Unravels*

Events overtook the plan. At the sentencing of the break-in defendants the next day, Judge Sirica disclosed a letter from McCord revealing that the burglars had been forced to remain silent, that perjury had been committed, and that others were involved in the break-in. By mid-April 1973 a number of the conspirators, including Dean and Magruder, decided to acknowledge their guilt,

but petitioners remained steadfast, hoping to save themselves and, at any cost, to conceal the involvement of President Nixon. (Tr. 3253-62; 3277-80, 4639-43.)

Mitchell, who was told on March 22 by President Nixon "to stonewall it, let them plead the Fifth Amendment, cover-up or anything else, if it'll . . . save the plan" (Tape Tr. 295), did just that: testifying before the grand jury and the Senate Select Committee, he denied any recollection of having been told of Liddy's confession to CRP officials and claimed that he had not discussed the destruction of CRP's Gemstone file. (Tr. 7158, 7166-67, 7177-80.)[7]

Haldeman, Ehrlichman and the President began developing a "scenario" to place the blame for any illegality on Dean and to explain their role in the money payments. Haldeman and Ehrlichman spun out a tale that Dean had been asked to write a report; that when he failed to do so, the President became suspicious and assigned Ehrlichman to conduct an investigation; and that this investigation revealed that Dean was deeply involved in Watergate. As to the money, both Haldeman and Ehrlichman proposed the explanation that they had intended only to keep the break-in defendants from talking to the press. They wanted to talk to their attorneys, however, before getting "too far out" on this line; they feared that they might need "something perhaps better" and concluded that they had to give more thought to the "strategy" that they would "have with the money." (Tape Tr. 500-04, 557-67, 570-74, 585-86.)

When Haldeman was questioned before the Senate Select Committee, he falsely claimed that he had not

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[7]These false statements were the subject of Counts Five and Six, respectively (J.A. 20-24).

been aware before March 21 that the burglars had been paid to keep silent. He also testified falsely that there had been no discussion of Magruder's perjury during the March 21 meeting and that the President had said that "it would be wrong" to raise a million dollars for the burglars. (Tr. 7483-89.)[8]

Ehrlichman, meanwhile, falsely claimed before the grand jury that he did not recall whether Dean had informed him in the week following the break-in of Liddy's involvement and falsely testified that he had not told Kalmbach that Kalmbach's efforts to raise money should be kept secret. (Tr. 7180-92.)[9]

ARGUMENT

While the trial in this case was profoundly important—the conspiracy to obstruct justice among those holding positions of public trust constituted an assault on the fundamental principle that no man is above the law—the issues presented by petitioners for review are common and familiar. The court below, in a thorough and careful opinion, affirmed the convictions on grounds that are fully consistent with decisions of this Court, as well as other courts of appeals. Accordingly, there is no basis for further review.

I. Petitioners Received a Fair Trial By an Impartial Jury.

Whether the question is framed in terms of petitioners' Sixth Amendment rights or the federal courts' supervisory responsibility to ensure that criminal trials are conducted

[8]This testimony was the subject of Counts Seven, Eight and Nine, respectively.

[9]This testimony was the subject of Counts Eleven, and Twelve, respectively.

in accordance with basic concepts of fairness, petitioners' principal contention is that, because pre-trial publicity in this case made it impossible for them to receive a fair trial, the district court and the court of appeals erred by refusing to impose a lengthy continuance. They urge reversal despite the conclusions of both courts below that an impartial jury was selected.[10] This Court consistently has recognized, however, that the mere fact of extensive pre-trial publicity is not determinative. "[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 565.

In accordance with this Court's decisions, the court below focused on the decisive question whether petitioners had been tried by "a panel of impartial, 'indifferent'

[10]Petitioners' demand for a continuance was presented to this Court twice previously. On August 22, 1974, the court of appeals, without passing on petitioners' petition for a writ of mandamus seeking a continuance based on pre-trial publicity, suggested that a continuance of three to four weeks would be appropriate "for further trial preparation." *Ehrlichman* v. *Sirica* (D.C. Cir. Nos. 74-1826, 1839). Mr. Chief Justice Burger subsequently denied petitioner Ehrlichman's application for a stay of the trial. *Ehrlichman* v. *Sirica*, 419 U.S. 1310.

After the trial court continued the trial for three weeks, the court of appeals denied petitions for a writ of mandamus seeking an "indefinite" delay, stating that on "the basis of the facts and allegations presented by petitioners, we cannot conclude . . . that it will be impossible to select a fair and impartial jury in this case." The court ruled that the "trial court will make this determination on the basis of the facts developed at the *voir dire* examination." *Mitchell* v. *Sirica* (D.C. Cir. No. 74-1878, September 20, 1974). Mr. Justice Brennan denied a further stay of the trial. *Mitchell* v. *Sirica* (S. Ct. No. A-217, September 26, 1974).

jurors." *Irvin* v. *Dowd,* 366 U.S. 717, 722. Based upon its own painstaking review of the *voir dire* examination (Pet. App. 34-42), the court of appeals stated unequivocally that it had "no doubt that the jury was impartial" (Pet. App. 47). The court of appeals' analysis, which demonstrates that there is no basis for petitioners' assertions that the court defaulted on its duty to make an independent evaluation of the voir dire (Ehrlichman Pet. 18; Mitchell Pet. 19), also confirms that not one of the jurors finally empaneled had a preconceived opinion as to the guilt of any defendant, including petitioners, and each juror swore under oath that he could render a verdict based solely upon the evidence and the law.[11] Clearly, then, as in *Beck* v. *Washington,* 369 U.S. 541, 557, "each juror's qualifications as to impartiality exceeded the minimum standards" established in *Irvin* v. *Dowd, supra,* 366 U.S. at 722-73, and reaffirmed in *Murphy* v. *Florida,* 421 U.S. 794, 799-800.

While this Court has recognized that the *voir dire* may reveal "a community with sentiment so poisoned against [the defendant] as to impeach the indifference of jurors who displayed no hostile animus of their own," *Murphy* v. *Florida, supra, 421* U.S. at 803, the voir dire here afforded no basis for rejecting the jurors' sworn assurances of impartiality. Individual questioning of the potential jurors disclosed that the overwhelming majority—even of those with knowledge of "Watergate"—had only vague, general impressions, rather than deep seated conclusions, and there was not the slightest indication of a community

[11]Even petitioners, in their briefs below, would claim no more than that three jurors were "inclined to belief in guilt." The court of appeals' careful review of the *voir dire* of the three jurors, including Juror Milbourn, who petitioner Ehrlichman challenges (Pet. 18-19), more than justifies its conclusion that "[t]here is no basis for holding that any of these jurors [was] biased against appellants." (Pet. App. 47 n. 57.)

desire for revenge or retribution (Pet. App. 28-9 n.37).[12] Only 21 out of 73 prospective jurors, or 29% of those questioned individually on opinions of guilt or innocence, expressed an opinion of the defendants' guilt. Only 6 (8% of the array) had an opinion that they indicated could not be set aside. (Pet. App. 46 n.56.) By contrast, in *Irvin* v. *Dowd, supra,* 366 U.S. at 727, 90% of the prospective jurors "entertained some opinion as to guilt"; 60% had "fixed opinions", and eight of the jurors eventually empaneled believed defendant was guilty before hearing any evidence. Rather, the results of the *voir dire* are comparable to cases where this Court has *affirmed* convictions despite extensive publicity. *See Murphy* v. *Florida, supra,* 421 U.S. at 803 (20 of the 78 questioned, or 25% of the venire, indicated an opinion of guilt); *Beck* v. *Washington, supra,* 369 U.S. at 556 (27% of the prospective jurors, 14 of 52 veniremen, expressed some bias).

Moreover, because of the nature and content of the publicity, the nature of the alleged crimes and appellants' defenses, and the conduct of the trial, this case is far different from those where this Court has reversed convictions. First, as the court of appeals confirmed by its independent examination of the pre-trial publicity, the bulk of the publicity consisted of "straight news stories," *Beck* v. *Washington, supra,* 369 U.S. at 556 and did not focus upon the alleged guilt of petitioners (Pet. App. 26-27 & N.34).[13]

[12]Indeed, if anything, the *voir dire* showed that the publicity had the opposite effect. More than 38% of the entire array believed that it was unfair to prosecute the defendants in light of the pardon granted to former President Nixon.

[13]*Contrast Irvin* v. *Dowd, supra; Rideau* v. *Louisiana,* 373 U.S. 723 and *Sheppard* v. *Maxwell,* 384 U.S. 333, where the massive pre-trial publicity focused entirely upon *one defendant* and his commission of the crime and where the public accusations related directly and specifically to the *very issue* that the jurors ultimately were bound to decide.

Second, the publicity was not inconsistent with petitioners' defenses. Petitioners did not challenge the government's contention that there had been a conspiracy to obstruct justice in connection with the Watergate investigation, but asserted that others, such as Dean and Magruder, had been solely responsible. Thus, while the public may have gained the general impression that wrongdoing had occurred, that conclusion—which petitioners did not dispute—would not have inhibited a jury from fairly deciding the *individual* guilt of petitioners.

Third, there was no sustained, highly inflammatory publicity about past criminal records, confessions or other blatantly prejudicial allegations unrelated to events that were explored in detail at trial.[14]

Fourth, unlike *Irvin, Rideau* and *Sheppard,* the offenses charged here were not crimes of violence and passion, which often have an unusual propensity to arouse and inflame passions, spread fear in the community and encourage emotional cries for retribution.[15]

Finally, the jurors were sequestered during the entire trial, which lasted for three months. Common sense

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[14]A common thread running through *Irvin, Rideau,* and *Sheppard* is that the jury had been indelibly exposed to highly inculpatory information about the defendant that necessarily had a devastating impact on the jury's ability to be impartial.

[15]Petitioners harp on the court of appeals' reference to this factor, even going so far as to suggest that the "amazing passage buried in a footnote" was not merely the crucial, but the only, basis for the court's conclusion that petitioners had not been denied a fair trial (Mitchell Pet. 9-11, 13, 20). Any objective reading of the 26 pages the court of appeals devoted to its discussion of pre-trial publicity demonstrates that the one footnote to which petitioners refer on three separate occasions was only one of several factors on which the court distinguished prior cases reversing convictions on the grounds of pre-trial publicity.

dictates that their concentrated exposure to the detailed evidence during trial would have eclipsed any general impression they may have gleaned from pre-trial publicity and that their recollection of facts based on that publicity would have become increasingly vague. Sequestration "enhances the likelihood of dissipating the impact of pre-trial publicity and emphasizes the elements of the jurors' oaths." *Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 564.[16]

The trial judge, of course, has broad discretion to deny a continuance, *Ungar* v. *Sarafite,* 376 U.S. 575, 589, and it is the defendant who bears the burden of showing that that discretion has been abused and that he has not received a fair trial.[17] That burden must "be sustained not

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[16]This Court's decision in *Sheppard* v. *Maxwell* is particularly instructive. The amount of pre-trial publicity there was at least as great as that here, and was far more prejudicial. Nevertheless, the Court concluded that, despite the massive and inflammatory publicity, Sheppard could have received a fair trial if the judge had taken certain precautionary measures, such as sequestering the jury and exercising proper control over the courtroom and the conduct of the trial. 384 U.S. at 354-55, 358. *See also, Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 601 & n. 26 (opinion of Mr. Justice Brennan, concurring in the judgment).

In this case, the trial judge (1) issued an order upon the return of the indictment barring extrajudicial statements by government and defense lawyers; (2) dismissed the original panel of 400 prospective jurors when the trial was continued for three weeks out of concern that those jurors might have followed "Watergate" developments particularly closely during the continuance; (3) conducted the *voir dire in camera* to keep publicity at a minimum during jury selection; and (4) strongly admonished the jury that it could consider only the evidence presented in court and then sequestered the jury for the entire duration of the trial. The trial was conducted with dignity and decorum in a regular courtroom under procedures applicable to all federal criminal trials.

[17]*See Murphy* v. *Florida, supra,* 421 U.S. at 800, 803; *Beck* v. *Washington, supra,* 369 U.S. at 558; *Irvin* v. *Dowd, supra,* 366 U.S. at 723; *Reynolds* v. *United States,* 98 U.S. 145, 157.

as a matter of speculation but as a demonstrable reality." *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462, quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281. Petitioners failed to meet that burden below, and there is nothing in their petitions that suggests that they could meet it here.

II. The Court of Appeals Properly Refused to Impose an Invariable Rule, Pursuant to its Supervisory Power, Requiring an Extended Continuance in All Cases Involving Substantial Pre-Trial Publicity.

Petitioners received a fair trial by an impartial jury in accordance with constitutional demands and the decisions of this Court. Nevertheless, they maintain that the court of appeals defaulted on its "duty" to assume supervisory jurisdiction because it failed to reverse their convictions without regard to demonstrable prejudice. The argument, to say the least, is disingenuous. Despite petitioners' failure to raise the question of supervisory jurisdiction, in its briefs below, the court of appeals recognized its obligation and carefully delineated its grounds for refusing to disturb the procedures followed by the district court (Pet. App. 28-33).

Although petitioners fail to propose a supervisory standard that they would have the Court adopt, the thrust of their argument is clear: the only standard that could afford them the relief they seek is an invariable rule requiring an extended continuance in cases involving substantial pre-trial publicity, without regard to whether the publicity has rendered it impossible to select an impartial jury (*see, e.g.*, Ehrlichman Pet. 16, Mitchell Pet. 22). The court of appeals refused to adopt such a rule, holding that the district judge properly refused pre-*voir dire* requests for a continuance (Pet. App. 32-33). That decision is fully consistent with decisions of this Court and is consonant with historic notions of good policy in the administration of criminal justice.

The accommodation reflected in *Irvin* v. *Dowd* between the First and Sixth Amendments becomes all the more important to a prompt, yet fair resolution of the issues raised by an investigation and prosecution of the kind involved here. *See generally, Nebraska Press Ass'n* v. *Stuart, supra.* As the Fifth Circuit recently noted, "[i]n prominent cases of national concern, we cannot allow widespread publicity concerning these matters to paralyze our system of justice." *Calley* v. *Callaway*, 519 F. 2d 184, 210 (C.A. 5), *certiorari denied sub nom. Calley* v. *Hoffman*, 425 U.S. 911. *See also, United States* v. *Dennis*, 183 F. 2d 201, 226 (C.A. 2) (L. Hand, J.), *aff'd*, 341 U.S. 494. While a defendant's right to a fair trial must remain inviolate, at the same time the courts must respect and protect the public's right to a speedy resolution of criminal cases of public moment. *See Barker* v. *Wingo*, 407 U.S. 514, 519-21. As this Court cautioned in *Murphy* v. *Florida, supra*, 421 U.S. at 801, n. 4, "[t]o ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent."

It is against this background that the court of appeals condemned any rule that would introduce "uncertainty into the process of litigating controversial cases" without guaranteeing a "commensurate increase in the fairness of federal criminal trial" (Pet. App. 29-30). Clearly, a hard-and-fast rule requiring a continuance or a change of venue whenever pre-trial publicity reached a defined minimum level (if such a level could be defined), without a showing of actual prejudice, inevitably and needlessly would sacrifice historic values served by speedy trial in the locale where the crime was committed (Pet. App. 29 n. 38). Similarly, the court's reluctance to direct the trial

judge to assess the nature and impact of the publicity without the aid of the *voir dire* stemmed from its recognition that any such evaluation is necessarily speculative any may unjustifiably impinge on other constitutional or societal interests, concerns similar to those that underlay this Court's decision in *Nebraska Press*. *See* 427 U.S. at 563-65 (Burger, C.J., for the Court) and 601-04 (Brennan, J., concurring).

Instead, the court of appeals reaffirmed the long-standing rule in the circuit that the impact of pretrial publicity can be measured only through the *voir dire* and that only then can an informed judgment be made whether a continuance or change of venue is required. This procedure has governed the federal courts' response to pre-trial publicity since the trial of Aaron Burr, and there is no reason to abandon it now. *See Nebraska Press Ass'n* v. *Stuart, supra*, 427 U.S. at 564 (Burger, C.J.) and 604 (Brennan, J., concurring). The suggestion that the approach was deficient because the court had not "formulated supervisory standards to guide its own evaluation" of the *voir dire* (Mitchell Pet. 19-20), is belied by the court's decision. The District of Columbia Circuit, like other circuits, has turned to Section 3.4 of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press for guidance and developed detailed voir dire procedures to be applied in cases involving extensive pre-trial publicity.[18] The court of appeals held that the

[18]*See, e.g., United States* v. *Peterson*, 475 F. 2d 806 (C.A. 9), *certiorari denied*, 414 U.S. 846; *United States* v. *Bryant*, 471 F. 2d 1040 (C.A.D.C.), *certiorari denied*, 409 U.S. 1112; *United States* v. *Addonizio*, 451 F. 2d 49 (C.A. 3), *certiorari denied*, 405 U.S. 936; *United States* v. *Colabella*, 448 F. 2d 1299 (C.A. 2), *certiorari denied*, 405 U.S. 929; *Patriarca* v. *United States*, 402 F. 2d 314 (C.A. 1), *certiorari denied*, 393 U.S. 1022.

voir dire was conducted in accordance with these standards (Pet. App. 43-45).[19]

The asserted conflict between this decision and *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1), is illusory. In *Delaney*, the First Circuit, in the exercise of its supervisory powers, reversed a conviction because the district court had not granted a continuance in the wake of congressional hearings, held after Delaney's indictment and shortly before his trial, focusing sharply upon the same derelictions of duty by Delaney (he was a Collector of Internal Revenue) that formed the basis for his indictment. The hearings also ranged beyond matters covered by the indictment to include charges against Delaney of larceny, embezzlement, income tax evasion, fraud and influencing peddling. 199 F. 2d at 110, 113. The most significant thing that led the First Circuit to reverse without regard to demonstrable prejudice was the governmental abuse the court perceived in subjecting Delaney to open congressional hearings after he was indicted and immediately before he was scheduled to be tried. 199 F. 2d at 114-15.[20] Thus, *Delaney* is an example of the exercise of the courts' supervisory power as a response to improper activity by a co-ordinate branch. *See* Note, *The Supervisory Power of Federal Courts*, 76 Harv. L. Rev. 1656, 1660-64 (1963).

[19]The court of appeals' discussion demonstrates that the claim of petitioners Mitchell and Haldeman that the trial judge refused to ask "content" questions and settled for "no" answers to two questions (Pet. 9-10 n. 5) is nothing more than rhetoric.

[20]As the court of appeals observed (Pet. App. 30-31 n. 40), later decisions of this Court—in particular, *Beck* v. *Washington, supra*, which also involved pre-trial publicity stemming from congressional hearings—cast doubt upon the inflexible approach of the First Circuit.

By contrast, petitioners appeared before the Senate Select Committee nine months before indictment and more than one year before trial, a distinguishing factor the *Delaney* court itself listed as significant. 199 F. 2d at 114-15. Although the impeachment hearings of the House Judiciary Committee were held after petitioners' indictment and shortly before trial, the propriety of the hearings cannot be questioned. They were held pursuant to explicit constitutional power conferred solely on the House of Representatives. Moreover, all evidence was taken in executive session; public debate focused on President Nixon, not petitioners; and most of the evidence referred to publicly was later introduced in detail at petitioners' trial. *Contrast Delaney, supra*, 199 F. 2d at 113-14.

Finally, petitioners ignore this Court's admonition in *Marshall* v. *United States*, 360 U.S. 310, 312, the only case in which this court has exercised its supervisory power to overturn a conviction on the grounds of jurors' exposure to prejudicial publicity—that "each case must turn on its special facts."[21] The court below reviewed the record and ascertained that petitioners "were tried by an unbiased jury capable of basing its verdict solely on the evidence introduced at trial" and, having found no basis for concluding that the "verdict rested on anything other than the overwhelming evidence of [petitioners'] guilt," properly affirmed the convictions. (Pet. App. 45-56).

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[21]For the reasons stated by the court of appeals (Pet. App. 31-32 n. 41), *Marshall*, which involved jurors' exposure *during trial* to prejudicial publicity about evidence the court had ruled inadmissible, is distinguishable from the case at hand.

III. The Trial Court Properly Refused To Suspend The Trial So That Petitioners Might Secure Additional Testimony, Where There Was No Showing That The Testimony Would Be Favorable Or Material To The Defense.

The facts leading up to the trial court's decision not to suspend the trial to enable petitioners to secure the testimony of former President Nixon are accurately summarized by the court of appeals (Pet. App. 69-73). The trial court was confronted with a situation in which a seemingly available witness suddenly became unvailable *during* the course of the trial. At a minimum, a continuance of two weeks was required before petitioners even could begin deposing Mr. Nixon, and it would have been several weeks before the trial could have been resumed. Against this background, the trial judge properly demanded a showing that the testimony sought was material to the defense and, in the absence of that showing, properly denied the continuance. *United States* v. *Mitchell*, 385 F. Supp. 1190, 1192 (D.D.C.). Applying the same standards, the court of appeals concluded that the district court did not abuse its discretion (Pet. App. 77-84).

Contrary to petitioners' claims, there is no need for further "exploration" by this Court. The decision below is consistent with well developed and uniformly applied standards. The courts of appeals consistently have held that the suspension of an ongoing trial based upon the temporary unavailability of a witness is justified only where the movant demonstrates that the witness' testimony will be favorable to his defense. *See, e.g., United States* v. *Cawley*, 481 F. 2d 702, 705 (C.A. 5); *Dearinger* v. *United States*, 468 F. 2d 1032, 1034-35 (C.A. 9); *United States* v. *Roca-Alvarez*, 451 F. 2d 843, 847 (C.A. 5); *Leino* v. *United States*, 338 F. 2d 154, 156 (C.A. 10); *Neufield* v. *United States*, 118 F. 2d 375, 380 (C.A.D.C.),

certiorari denied, 315 U.S. 798. They also have recognized, in accordance with decisions of this Court, that the trial judge has discretion to deny a continuance where the proffered testimony would not be material either because it would be cumulative or because it would be insignificant. *See, e.g., Isaacs* v. *United States*, 159 U.S. 487, 489; *Crumpton* v. *United States*, 138 U.S. 361, 364-65; *United States* v. *Reed*, 476 F. 2d 1145, 1147 n. 1 (C.A.D.C.); *Jackson* v. *United States*, 330 F. 2d 445 (C.A. 5), *certiorari denied*, 379 U.S. 821; *United States* v. *Lustig*, 163 F. 2d 85, 89 (C.A. 2), *certiorari denied*, 332 U.S. 775. While petitioner Ehrlichman asserts that "Nixon's testimony was indispensable and that it could have led to a different conclusion" (Pet. 21), his conclusory allegations were advanced in both courts below and carefully considered and rejected. There is no need to elaborate here on the analysis of the court of appeals leading to its conclusion that (1) there was no showing precisely what testimony petitioners hoped to elicit from Mr. Nixon, let alone that it would be favorable to their defense; (2) Mr. Nixon's testimony only could have been cumulative of other evidence; and (3) his testimony could not have disputed the central propositions in the government's case (Pet. App. 80-84).

The principal cases on which petitioners rely—*Chambers* v. *Mississippi*, 410 U.S. 284; and *Washington* v. *Texas*, 388 U.S. 14—both relate to a trial court's refusal to permit the defendant to present an *available* witness. To the extent they bear at all on the far different question whether a trial must be suspended to permit a defendant to obtain a witness who may become available in the future, they support the decision below. One of the critical elements in this Court's holdings that Washington and Chambers were deprived of their right to compulsory process was the conclusion in *Washington* that the testimony proffered was "material" and "vital" to the defense, 388 U.S. at 16, 23, and in *Chambers* that it was "critical," 410 U.S. at 302. Similarly, this Court's discussion of the Sixth Amendment right to compulsory process in *United States* v. *Nixon*, 418 U.S. 683, 709, was in the context of evidence for which there was a "demonstrated, specific need" and which was "essential to the justice of the [pending criminal] case." 418 U.S. at 713. There has been no such showing here.

IV. Petitioner Ehrlichman Was Not Deprived of The Right To Counsel In Connection With Pre-Trial Discovery

Petitioner Ehrlichman's claim that "[i]n essence [he] was required to inspect his White House papers without the benefit of counsel" (Pet. 18) simply is not supported by the record. Although at one time access to his White House files had been restricted to Ehrlichman alone, this restriction was removed to permit counsel to accompany him (see Tr. 8394, 8628-31; Pet. App. 58-59 n. 93). Moreover, any suggestion that petitioner was denied discovery rights is laid to rest by the court of appeals' extensive discussion of the discovery he was provided (Pet. App. 52-65).[22]

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[22]Petitioner's claim that he was deprived of his right to counsel in reviewing his White House files also was presented as an issue for review in *United States* v. *Ehrlichman*, 546 F. 2d 910 (C.A. D.C.), *certiorari denied*, 45 U.S.L.W. 3558 (February 22, 1977). In that case, involving petitioner's earlier conviction for the Ellsberg break-in, counsel had *not* been permitted to aid in the actual review and was restricted to consulting with petitioner based upon petitioner's recollection and notes. The court of appeals rejected petitioner's Sixth Amendment claim. *United States* v. *Ehrlichman*, 546 F. 2d at 932.

V. The Government Properly Used The Testimony Of Petitioner Mitchell Given Before Congressional Committees

Petitioner Mitchell attacks the government's use at trial of testimony he gave before congressional committees on the ground that the testimony was taken in violation of a supposed "right to remain silent."[23] He asserts this right because he was a "target" of the grand jury investigation when subpoenaed before the Senate Select Committee and was under indictment when subpoenaed before the House Judiciary Committee. Although he seeks to place a novel cast on the argument by structuring it in terms of the right to a fair trial, the argument has been foreclosed by decisions of this Court.

In *Watkins* v. *United States*, 354 U.S. 178, 187-188, the Court stated that "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation." The Fifth Amendment privilege against compulsory self-incrimination does not relieve this obligation. A "target" of an investigation has no constitutional privilege *to refuse to appear*, even though he may be subject to criminal prosecution for the conduct that is the focus of the inquiry. This is so in the context of legislative investigations, *Hutcheson* v. *United States*, 369 U.S. 599, 613, just as it is in the context of a grand jury investigation, *United States* v. *Dionisio*,

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[23]Mitchell made no objection at trial to the use of his congressional testimony, although his pre-trial motion to dismiss the indictment charged that he "was denied fundamental fairness and due process by being compelled to testify before the Senate Committee at a time when he was a putative defendant in this case" (J.A. 267).

410 U.S. 1, 10 n. 8, a separate criminal trial of a co-defendant, *United States* v. *Shuford*, 454 F. 2d 772, 777 (C.A. 4), a civil case that is a companion to a criminal prosecution, *United States* v. *Kordel*, 397 U.S. 1, and an administrative proceeding, *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111-12. In those circumstances if the witness "desires the protection of the [Fifth Amendment] privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the amendment." *United States* v. *Monia*, 317 U.S. 424, 427; *see Garner* v. *United States*, 424 U.S. 648, 654; *United States* v. *Kordel*, *supra*, 397 U.S. at 9-10.

Mitchell seeks to avoid this clear authority by relying on the right to a fair trial rather than the privilege against self-incrimination.[24] As support, he lists the invidious effects he foresees as a result of permitting a putative or actual defendant to be summoned before a congressional forum: the defendant is subject to a public trial on the same charges; he is forced "to disgorge his defense"; and he is subject to "pretrial 'compulsory discovery' by the Government" (Pet. 24-25). These effects can be avoided, however, by the course that has been laid out by the decisions of this Court—claiming the privilege against self-incrimination.

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[24]Not suprisingly, Mitchell no longer places principal reliance, as he did below (see Pet. App. 94), on *Miranda* v. *Arizona*, 384 U.S. 436 As recent decisions of this Court have emphasized, *Miranda* applies only to custodial interrogation. *See Oregon* v. *Mathiason*, ___ *U.S.* ___, *45 U.S.L.W. 3500 (January 25, 1977)*; *Beckwith* v. *United States*, 425 U.S. 341, 344. It is designed, among other things, to ensure that the suspect appreciates that he has no obligation to respond to questions. Obviously, it has no application where the witness is under subpoena, as in this case, and, thus, has an obligation to respond and where he is accompanied by counsel and fully apprised of his Fifth Amendment rights.

Mitchell seems to suggest, however, that this was an intolerable alternative because claiming the privilege in public would itself have impinged on his right to a fair trial.[25] As the court of appeals responded (Pet. App. 103-04), the *voir dire* of the venire provides more than adequate protection to ensure that no juror has been prejudiced against the defendant through his awareness that the defendant previously has asserted his Fifth Amendment privilege. *Cf., Hutcheson* v. *United States, supra,* 369 U.S. at 612.

Finally, we note that, even if Mitchell had a "right to remain silent," the uses of his testimony of which he complained still would have been proper. Violation of such a right could not have precluded the government from using his false testimony as the basis for a perjury prosecution, *see United States* v. *Mandujano,* 425 U.S. 565, or from using his testimony as a basis for impeachment during his cross-examination. *See Oregon* v. *Haas,* 420 U.S. 714, 722; *Harris* v. *New York,* 401 U.S. 222, 226.

VI. The Facts Alleged in Support Of The Motion To Disqualify The Trial Judge Were Insufficient As A Matter of Law To Establish Personal Bias

The issue petitioner Mitchell seeks to raise concerning disqualification of the trial judge is not presented by the record.[26] He suggests that both the court of appeals and

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[25] Mitchell erroneously states that he would have been required to claim the privilege before both committees on national television (Pet. 24). The hearings before the House Judiciary Committee were held in executive session, and Mitchell was told by the Committee in advance of his testimony that it would not require his appearance if he notified the Committee that he intended to rely upon the Fifth Amendment.

[26] Petitioner Haldeman did not move to disqualify the trial judge, and, although petitioner Ehrlichman was one of the moving parties below, he does not raise the issue here. This issue has been before this court once before when it denied review of the pre-trial decision of the court of appeals denying a petition for a writ of mandamus. *See Mitchell* v. *Sirica,* 502 F. 2d 375 (C.A. D.C.) (*en banc*), *certiorari denied,* 418 U.S. 955.

the trial judge, contrary to the requirements of *Berger* v. *United States,* 255 U.S. 22, engaged in an analysis of the truth of the facts alleged in support of the claim of personal bias. It is clear from the opinions of both courts, however, that the trial judge (377 F. Supp. at 1320) and the court of appeals (Pet. 181-93) each assumed that the facts alleged in support of disqualification were true, but concluded as a matter of law that they were not sufficient, even if true, to establish personal bias within the meaning of 28 U.S.C. §144. Significantly, petitioner does not challenge this conclusion, and the opinion of the court of appeals demonstrates that it is fully consistent with the decisions of this Court and of the other courts of appeals that have interpreted §144.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

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